

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3
4 Commonwealth Land Title Insurance
5 Company,

6 Appellant

7 v.

8 The Creditor Group,

9 Appellee

2:14-cv-01394-JAD

**Order Reversing Bankruptcy Court
Decision**

10 Appellant Commonwealth Land Title Insurance Company files this appeal seeking
11 reversal of the bankruptcy court's 2014 order sustaining appellee The Creditor Group's objection
12 to Commonwealth's bankruptcy claim against R&S St. Rose Lenders, LLC (Lenders). The
13 bankruptcy court determined that Commonwealth's claim was barred by the doctrine of claim
14 preclusion as the result of a related state-court action, and Commonwealth appealed. Because no
15 res judicata defense applies to Commonwealth's claims, I reverse that decision.

16 **Background**

17 In 2005, two companies, Lenders and R&S Rose, LLC (R&S), were formed by Saiid
18 Forouzan Rad and R. Phillip Nourafchan (the owners) to facilitate the purchase of 38 acres of
19 real property in Henderson, Nevada.¹ R&S was formed to enter into a land-banking arrangement
20 with developer Centex Homes. Lenders was formed to borrow funds from individual lenders
21 and then loan those funds to R&S to buy the property.

22 To finance the property, R&S obtained an approximately \$29 million loan from Colonial
23 Bank, which was secured by a first-position deed of trust against the property. Soon after, the
24 owners signed a promissory note in favor of Lenders, secured by a second-position deed of trust.
25 In 2007, the owners sought a new loan from Colonial for another \$43 million when Centex

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27 ¹ ECF No. 10 at 5; ECF No. 16 at 7-8; state-court order, ECF No. 11 at 59; *R&S Lenders, LLC v.*
28 *Branch Banking and Trust Co*, 2013 WL 3357064 (Nev. 2013) (unpublished) (Supreme Court of
Nevada's order affirming state-court order).

1 unexpectedly backed out of the sale. The new loan would be used to pay off Colonial's first loan
2 and improve the property for future sale. However, due to Lender's 2005 deed of trust, the
3 owners did not meet Colonial's equity requirement to qualify for the loan. To qualify, the
4 owners allegedly made several representations that they would subordinate or reconvey their
5 second-position deed, putting Colonial's deed of trust for the 2007 loan in first position.
6 Purportedly in reliance on these representations, Colonial approved the new loan.
7 Commonwealth, allegedly relying on the same representations, issued a title policy with Colonial
8 as the beneficiary, insuring what was believed to be a first-position deed of trust. The owners,
9 however, never reconveyed the Lenders deed of trust, so the 2007 Colonial deed of trust was not
10 placed in first position.

11 In 2009, Colonial filed a state-court action against Lenders alleging that its 2007 deed of
12 trust had priority over the owners' 2005 deed.² Soon afterward, Colonial was placed in
13 receivership by the Federal Deposit Insurance Corporation (FDIC) and Branch Banking & Trust
14 Company (BB&T) purchased Colonial's assets. BB&T then filed an amended complaint in the
15 state-court action as Colonial's successor-in-interest, alleging six causes of action: (1)
16 declaratory relief - contractual subrogation; (2) declaratory relief/quiet title - replacement; (3)
17 equitable/promissory estoppel; (4) unjust enrichment; (5) fraudulent misrepresentation; and (6)
18 civil conspiracy.³ In 2010, after a bench trial on the issue, the state court granted judgment in
19 favor of Lenders on BB&T's first four claims, holding that "BB&T failed to meet[] its burden of
20 proof to establish that the Colonial Bank loan, note[,] and deed of trust at issue in this case were
21 ever assigned to BB&T."⁴ The state court also included several "findings of fact," indicating
22 that the court believed that no fraudulent misrepresentations were made to Colonial.⁵ BB&T
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24 ² That action was consolidated with a separate state-court action brought by investors who
25 loaned money to Lenders. *See* state-court order, ECF No. 11 at 55.

26 ³ *Id.*

27 ⁴ *Id.* at 58.

28 ⁵ Bankruptcy-court order, ECF No. 1 at 13-16.

1 then voluntarily dismissed without prejudice its fraudulent misrepresentation and civil-
2 conspiracy claims.⁶

3 The Supreme Court of Nevada affirmed the judgment in 2013, concluding that the lower
4 court's "decision was not clearly erroneous because BB&T failed to carry its evidentiary burden
5 to prove its ownership of the [2007] loan,"⁷ and it denied a request for en banc reconsideration in
6 2014.⁸

7 While BB&T was appealing the state-court action, Lenders and R&S filed separate
8 Chapter 11 bankruptcy proceedings.⁹ BB&T filed a proof of claim in Lenders' proceeding in an
9 unsecured amount of approximately \$38 million for the fraudulent-misrepresentation and civil-
10 conspiracy claims that BB&T had voluntarily dismissed from the state-court action.¹⁰ The
11 Creditor Group filed objections to BB&T's claim. The bankruptcy court issued an order
12 disallowing BB&T's claim under the doctrine of issue preclusion based on the judgment entered
13 against it in state court. That order was reversed by the District Court of Nevada in 2015 after it
14 found that the misrepresentation and civil-conspiracy claims were not actually and necessarily
15 litigated by the state court.¹¹

16 Commonwealth also filed a proof of claim in the unsecured amount of approximately \$43
17 million for fraud, misrepresentation, and negligence, based on same representations made to
18 Colonial. Commonwealth contends that those misrepresentations induced it to issue the title
19 policy, and that its fraud and misrepresentation claims are independent from similar claims
20 raised and voluntarily dismissed by BB&T in the state-court action. Again, the Creditor Group
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22 ⁶ *BB&T v. Creditor Group*, 2015 WL 1470692, at *2.

23 ⁷ *Lenders v. BB&T*, 2013 WL 3357064, at *3 (Nev. May 31, 2013).

24 ⁸ *Lenders v. BB&T*, No. 56640 (order denying en banc reconsideration) (Nev. Feb. 21, 2014).

25 ⁹ Bankruptcy-court order, ECF No. 1 at 4.

26 ¹⁰ *BB&T v. Creditor Group* 2015 WL 1470692 (D. Nev. Mar. 30, 2015).

27 ¹¹ *Id.*

1 objected, arguing that the claims were precluded. The bankruptcy court sustained the Creditor
2 Group's objection, finding that Commonwealth is in privity with BB&T, and the doctrine of
3 claim preclusion barred its claim by virtue of BB&T's involvement in the state-court action.
4 Commonwealth appeals that determination here.

5 **Discussion**

6 **A. Standard of review**

7 I review the bankruptcy court's decision for abuse of discretion and apply a two-part
8 test.¹² I consider de novo whether the court applied the correct legal standard.¹³ I review "the
9 determination of whether issue or claim preclusion applies de novo as mixed questions of law
10 and fact in which legal questions predominate."¹⁴ But I review the bankruptcy court's findings
11 of fact for clear error.¹⁵ A fact finding is only clearly erroneous "if it was without adequate
12 evidentiary support or was induced by an erroneous view of the law."¹⁶ I "may not simply
13 substitute [my] view" for that of the bankruptcy court.¹⁷ Finally, I may affirm on any basis
14 supported by the record.¹⁸

15 **B. Issues presented on appeal**

16 Commonwealth raises four issues on appeal. It argues that the bankruptcy court erred in
17 (1) sustaining the objection to its claim; (2) applying res judicata in connection with sustaining
18 the objection; (3) finding that the claim was based on the same claims that were or could have
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20 ¹² *Leavitt v. Soto*, 171 F.3d 1219, 1223 (9th Cir. 1999).

21 ¹³ *Id.*

22 ¹⁴ *In re Cogliano*, 355 B.R. 792, 800 (B.A.P. 9th Cir. 2006); *see also Robi v. Five Platters, Inc.*,
23 838 F.2d 318, 321 (9th Cir. 1988).

24 ¹⁵ *Id.*

25 ¹⁶ *Wall St. Plaza, LLC v. JSJF Corp.*, 344 B.R. 94, 99 (B.A.P. 9th Cir. 2006).

26 ¹⁷ *Barrera v. W. United Ins. Co.*, 567 Fed. App'x 491, 493 (9th Cir. 2014) (*citing U.S. v.*
27 *Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

28 ¹⁸ *Heilman v. Heilman*, 430 B.R. 213, 216 (B.A.P. 9th Cir. 2010).

1 been brought in the state-court action; and (4) finding that Commonwealth was in privity with
2 the parties to the state-court action. Although the bankruptcy court relied only on the doctrine of
3 claim preclusion to sustain the Creditor Group’s objection, the Creditor Group argues that
4 Commonwealth’s claim is also barred by issue preclusion and urges me to affirm on that basis as
5 well. The Creditor Group also argues that I can affirm because Commonwealth’s fraudulent-
6 misrepresentation claim fails as a matter of law.

7 **C. Claim preclusion**

8 To determine whether a claim is barred by issue or claim preclusion based on a state-
9 court ruling, I look to the laws of the state in which the prior judgment was entered.¹⁹ Under
10 Nevada Law, claim preclusion applies when: “(1) the parties or their privies are the same, (2) the
11 final judgment is valid, and (3) the subsequent action is based on the same claims or any part of
12 them that were or could have been brought in the first case.”²⁰ A “claim” under Nevada law
13 encompasses all claims that arise out of a single set of facts.²¹

14 **1. Privity**

15 Commonwealth was not a party to BB&T’s state-court action, so the binding effect of
16 any judgment depends on Commonwealth being in privity with BB&T. In Nevada, “[a] privity is
17 one who, after rendition of the judgment, has acquired an interest in the subject matter affected
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21 ¹⁹ *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *White v. City of*
22 *Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012) (“[A] federal court must give to a state-court
23 judgment the same preclusive effect as would be given that judgment under the law of the State
24 in which the judgment was rendered”).

25 ²⁰ *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008).

26 ²¹ *See Holcombe v. Holcombe*, 477 F.3d 1094, 1098 (9th Cir. 2007) (citing *Firsching v. Ferrara*,
27 578 P.2d 321, 322 (Nev. 1978) (“[T]he facts essential to the maintenance of both suits are
28 identical; therefore, both suits involve but one cause of action and, accordingly, the final
judgment in the formal suit bars subsequent litigation involving any matter which was or might,
with propriety, have been litigated therein.”)).

1 by the judgment through or under one of the parties as by inheritance, succession, or purchase.”²²
2 It has also been defined as one “who is directly interested in the subject matter, and had a right to
3 make defense, or to control the proceeding, and to appeal from the judgment.”²³ The Nevada
4 Supreme Court recently expanded the definition of privy when it adopted the Restatement
5 (Second) of Judgments § 41, which states: “A person who is not a party to an action but who is
6 represented by a party is bound by and entitled to the benefits of a judgment as though he were a
7 party.”²⁴ “A party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if, at
8 a minimum: (1) the interests of the nonparty and [its] representative are aligned and (2) either the
9 party understood [itself] to be acting in a representative capacity or the original court took care
10 to protect the interests of the nonparty.”²⁵

11 The bankruptcy court held that Commonwealth was in privy with BB&T as its insurer
12 under the title policy. The title policy gives Commonwealth the right:

13 to institute and prosecute any action or proceeding or to do any
14 other act which in its opinion may be necessary or desirable to
15 establish the title to the estate or interest or the lien of the insured
16 mortgage, as insured, or to prevent the loss or damage to the
17 insured. [Commonwealth] may take any appropriate action under
the terms of this policy, whether or not it shall be liable hereunder,
and shall not thereby concede liability or waive any provision of
this policy. If [Commonwealth] shall exercise its right under this
paragraph, it shall do so diligently.²⁶

18 The bankruptcy court determined that the relationship outlined by this section of the policy was
19 sufficient to show that Commonwealth had the right to intervene in the state-court action to bring
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22 ²² *Paradise Palms Cmty. Ass’n v. Paradise Homes*, 505 P.2d 596, 599 (Nev. 1973) (quoting
23 *Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 122 P.2d 892 (Cal. 1942)); *Bower v.*
24 *Harrah’s Laughlin Inc.*, 215 P.3d 709, 718 (Nev. 2009), *holding modified on other grounds by*
Garcia v. Prudential Ins. Co. of Am., 293 P.3d 869 (Nev. 2013).

25 ²³ *Paradise Palms*, 505 P.2d at 598–99 (internal quotation and citations omitted).

26 ²⁴ *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 915–17 (Nev. 2014).

27 ²⁵ *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008).

28 ²⁶ Title policy, ECF No. 11 at 15.

1 its own misrepresentation and negligence claims. But that is too expansive a reading of what the
2 title policy allows. It permits Commonwealth to institute actions to *establish title* or prevent
3 damage *to the insured*; it does not give Commonwealth the right to join *its own*
4 misrepresentation claims against Lenders or the owners. The fact that Commonwealth hired and
5 paid for BB&T's counsel in the state-court action, as permitted under a different section of the
6 title policy,²⁷ does not alter this finding. Those attorneys were hired to represent BB&T's
7 interests, not Commonwealth's.

8 Commonwealth's interest was also not adequately represented by BB&T in the state-
9 court action. There is no evidence that Commonwealth authorized BB&T to act on its behalf in
10 a fiduciary or representative capacity for Commonwealth's misrepresentation claims. BB&T's
11 case was brought to establish priority of title over Lender's deed of trust. While Commonwealth
12 has an interest in the subject matter of that litigation, it is distinct from Commonwealth's own
13 interest in redressing the misrepresentations by Lenders and its owners. Indeed, BB&T's
14 decision to voluntarily dismiss a misrepresentation claim similar to the one Commonwealth is
15 attempting to pursue through bankruptcy proceedings demonstrates that Commonwealth and
16 BB&T's interests were not identical. While I can imagine instances where an insurer could be in
17 privity with its insured—like when the insurer attempts to re-litigate the priority of an insured's
18 title in a separate action—this is not that case. Commonwealth has its own tort causes of action
19 to bring against the owners, and those claims were not adequately pursued in BB&T's state-court
20 action.

21 2. Final judgment

22 Even if Commonwealth could be considered BB&T's privy, there was no final judgment
23 that precludes Commonwealth from litigating its tort claims. Under Nevada law, a dismissal
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26 ²⁷ See *id.* (“Upon written request by the insured ... [Commonwealth], at its own cost and without
27 unreasonable delay, shall provide for the defense of an insured in litigation in which any third
28 party asserts a claim adverse to the title or interest as insured, but only as to those stated causes
of action alleging a defect, lien, or encumbrance or other matter insured against by this policy.”).

1 without prejudice does not result in a final judgment.²⁸ BB&T's misrepresentation claims in the
2 state action were voluntarily dismissed without prejudice, so no final judgment was entered on
3 those claims.

4 The Creditor Group argues that, because a final judgment was entered regarding the
5 operative facts and evidence essential to the state-court action that are identical to
6 Commonwealth's claims, then the claims are barred. The Creditor Group materially overstates
7 those findings. While the state court did render a final judgment on some portions of BB&T's
8 claims, none of the findings necessary to that judgment involved the alleged misrepresentations
9 that Commonwealth relies on for its misrepresentation and negligence claims. The state court
10 held that, because BB&T did not prove that it owned the loan at issue, it could not, as a matter of
11 law, bring its claims for contractual subrogation, quiet title, promissory estoppel, or unjust
12 enrichment. The Supreme Court of Nevada affirmed that judgment, finding that BB&T did not
13 have standing to bring any claims if it did not own the loan. That holding in no way affects
14 Commonwealth's argument that its reliance on misrepresentations made to Colonial caused
15 damages to Commonwealth separate from BB&T's state-court claims. Thus, there was no final
16 judgment concerning the operative facts and evidence essential to any misrepresentation or
17 negligence causes of action.

18 **D. Issue Preclusion**

19 Nor can the doctrine of issue preclusion support the disallowance of Commonwealth's
20 claim. In Nevada, the doctrine of issue preclusion has four elements: "(1) the issue decided in
21 the prior litigation must be identical to the issue presented in the current action; (2) the initial
22 ruling must have been on the merits and have become final; (3) the party against whom the
23 judgment is asserted must have been a party or in privity with a party prior to the litigation; and
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25 ²⁸ *Five Star*, 194 P.3d at 713 n.27 ("While the requirement of a valid final judgment does not
26 necessarily require a determination on the merits, it does not include a case that was dismissed
27 without prejudice . . ."); *see also Lighthouse v. Great W. Land & Castle*, 88 Nev. 55 (1972) (a
28 dismissal without prejudice is not an adjudication on the merits); *BB&T v. Creditor Group*, 2015
WL 1470692, at *2 n.1 (noting that the Creditor Group conceded that claim preclusion did not
apply to BB&T's bankruptcy claim stemming from the same state-court judgment).

1 (4) the issue was actually and necessarily litigated.”²⁹ The Nevada Supreme Court has held that
2 an issue is actually litigated when both parties participated in the action, findings of fact were
3 established by evidence, and the issue was necessary to the judgment in the earlier suit.³⁰ Just as
4 the lack of privity or a merits-based final judgment prevents claim preclusion from applying, it
5 bars the application of issue preclusion.

6 The Creditor Group’s argument that Commonwealth’s misrepresentation claim was
7 necessarily litigated in the state-court action was rejected by Chief Judge Navarro in *BB&T v.*
8 *Creditor Group*.³¹ She found that any state-court findings of fact related to the owner’s
9 representations to Colonial were not necessary to the state-court judgment, which hung on
10 whether BB&T could show that it owned the loan at issue.³² “Accordingly, no factual findings
11 on the merits of the underlying claims were necessary for the state court’s denial of BB&T’s
12 claims and the factual findings that were made are dicta.”³³ I find Judge Navarro’s assessment of
13 the state-court findings of fact persuasive and follow it. Whether the owners misrepresented that
14 the Lenders deed of trust would be reconveyed has not been actually or necessarily litigated by
15 the state court, so issue preclusion is not triggered in this case.

16 **E. Merits of Commonwealth’s claim**

17 Finally, the Creditor Group urges me to affirm the bankruptcy court’s judgment because
18 Commonwealth’s misrepresentation claims fail as a matter of law. Under Nevada law, a claim
19 for fraud or intentional misrepresentation requires: (1) a false representation made by the
20 defendant; (2) knowledge or belief on the part of the defendant that the representation is false, or
21 that he does not have a sufficient basis of information to made it; (3) an intention to induce the

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23 ²⁹ *Five Star*, 194 P.3d at 713.

24 ³⁰ *See Frei ex rel. Litem v. Goodsell*, 305 P.3d 70, 72 (Nev. 2013) (citing *In re Sandoval*, 232
25 P.3d 422 (Nev. 2010); *Univ. of Nev. v. Tarkanian*, 879 P.2d 1180, 1191 (Nev. 1994).

26 ³¹ *BB&T v. Creditor Group*, 2015 WL 1470692, at *4.

27 ³² *Id.*

28 ³³ *Id.*

1 plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) justifiable
2 reliance upon the representation on the part of the plaintiff in taking action or refraining from it;
3 and (5) damage to the plaintiff from the reliance.³⁴ The Creditor Group contends that, because
4 Commonwealth provided no evidence to the bankruptcy court that a fraudulent misrepresentation
5 was made directly to Commonwealth or one of its agents, it cannot state a claim for
6 misrepresentation under Nevada law.

7 Commonwealth counters with the principle of indirect reliance, which the Restatement
8 (Second) of Torts recognizes as an alternative theory of fraudulent-misrepresentation liability:

9 “The maker of a fraudulent misrepresentation is subject to liability
10 for pecuniary loss to another who acts in justifiable reliance upon
11 it if the misrepresentation, although not made directly to the other,
12 is made to a third person and the maker intends or has reason to
expect that its terms will be repeated or its substance
communicated to the other, and that it will influence her conduct in
the transaction or type of transaction involved.”³⁵

13 Commonwealth presented the bankruptcy court with evidence of alleged misrepresentations
14 made to Colonial, which Commonwealth claims it relied on when issuing the title policy.³⁶ The
15 Creditor Group provides no Nevada case that holds that a claim based on an indirect-reliance
16 theory necessarily fails as a matter of law, so I decline to affirm the bankruptcy court’s decision
17 on this basis.

18 Conclusion

19 Accordingly, IT IS HEREBY ORDERED that the United States Bankruptcy Court for the
20 District of Nevada’s order sustaining Creditor Group’s objection to Commonwealth’s

22 ³⁴ See *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004);
23 *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975).

24 ³⁵ Restatement (Second) of Torts § 533; see also *In re Zante*, 2010 WL 5477768, at *7-8 (D.
25 Nev. Dec. 29, 2010) (recognizing that, while the Nevada Supreme Court has not addressed the
26 issue of indirect reliance, the California Supreme Court and numerous district courts in the Ninth
Circuit have approved indirect-reliance theories in misrepresentation claims).

27 ³⁶ Commonwealth presented the bankruptcy court with testimony taken for the state-court action
28 from Brenda Burns, the escrow manager for the 2007 colonial loan, recounting the allegedly
fraudulent representations made by the owners. See ECF No. 11 at 82–94.

1 bankruptcy claim against debtor Lenders is **REVERSED**, and this matter is referred back to the
2 bankruptcy court for further proceedings.

3 The Clerk of the Court is directed to send a copy of this Order to the U.S. Bankruptcy
4 Court and close this case.

5 DATED: October 17, 2017.

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7 U.S. District Judge Jennifer A. Dorsey
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